The Department of Labor (DOL)’s formerly low-profile sub-agency, the Office of Federal Contract Compliance Programs (OFCCP), has been making a name for itself over the past year and a half, increasing its regulatory and enforcement activities to unprecedented levels. The OFCCP implements and enforces laws and presidential Executive Orders that impose affirmative action and nondiscrimination requirements on federal contractors and their subcontractors.

Higher education institutions often enter into government contracts or subcontracts as part of research or testing they perform for a wide array of federal agencies, including the Department of Health and Human Services, the Department of Transportation, the Department of Defense and the Department of Veterans Affairs, to name a few. As a result, many colleges and universities fall within the purview of OFCCP regulations and enforcement.

**OFCCP Mission and History**

In 1965, President Lyndon B. Johnson issued Executive Order 11246, which created the OFCCP and established nondiscrimination and affirmative action requirements for federal contractors. The Order is intended to ensure federal contractors provide equal employment opportunities on the basis of race, color, religion, sex and national origin. Over the past 47 years, the jurisdiction of OFCCP has been expanded by statute and now the agency is also tasked with ensuring equal employment opportunities for individuals with disabilities and veterans under the Rehabilitation Act of 1973, the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, and the Americans with Disabilities Act.

**Regulations of Concern**

Over the last year and a half, the OFCCP has begun the regulatory process to implement new highly technical reporting and record-keeping requirements. It is unclear if these new requirements will help OFCCP accomplish its mission. More details about these changes are below.

**NPRM on Nondiscrimination for Individuals With Disabilities**

On December 9, the OFCCP issued a notice of proposed rulemaking (NPRM) revising the nondiscrimination and affirmative action employment requirements regarding
individuals with disabilities for federal contractors and subcontractors. The proposed rule would amend the regulations implementing Section 503 of the Rehabilitation Act of 1973, dramatically increasing requirements for contractors.

As part of the proposal, OFCCP plans to expand the definition of disability, establish workforce composition goals (nationwide goal of 7 percent) and require linkage agreements between contractors and disability recruiting resources. OFCCP also intends to require that contractors invite individuals to voluntarily self identify as an individual with a disability pre- and post-offer and conduct an annual survey. In addition, the proposed rule would increase data collection and reporting requirements, necessitating contractors to change affirmative action policies and conduct an annual review.

On February 20, CUPA-HR submitted comments jointly with the Society for Human Resource Management (SHRM) on the proposed rule. While both associations strongly support OFCCP’s goal of expanding employment opportunities for individuals with disabilities, the rule as proposed does not provide any mechanism for accurately and reliably compiling data necessary to achieve that goal. At the same time, several aspects of the proposal promise to place unnecessary and substantial burdens on federal contractors, intrude on employee privacy and run afoul of other laws.

For example, the proposed requirement to invite individuals to voluntarily self identify as an individual with a disability two times in the hiring process and on an annual basis once hired runs contrary to the ADA’s prohibition of such inquiries. Moreover, voluntary self identification is unlikely to yield reliable data as many employees will choose not to volunteer information for privacy reasons and others may be mistaken as to whether or not they meet the vague definition of an individual with a disability.

In our comments, we asked OFCCP to institute a safe harbor for employers that would ensure that they are not liable under the ADA for any required inquiries. We also requested OFCCP to reevaluate the 7 percent utilization goal and other requirements until it can find more reliable sources of data.

**NPRM on Affirmative Action for Veterans**

On April 26, 2011, the OFCCP issued a NPRM to overhaul the federal contractor affirmative action program requirements for covered veterans and increase employment for veterans. The proposed rule details the additional requirements for a federal contractor to comply with the Veterans’ Readjustment Assistance Act. It would require for the first time that contractors establish numerical hiring benchmarks for protected veterans; establish numerous linkage or “partnership agreements” with veterans’ organizations; require extensive analysis to be conducted on current practices of recruitment and placement of veterans; and increase recordkeeping and record retention requirements.

CUPA-HR submitted comments jointly with SHRM on July 11, 2011. Again, while CUPA-HR fully supports the overarching goal of the proposed rule, the proposal, unfortunately, focuses primarily on expanded processes and steps for federal contractors that will significantly increase the burdens and costs on federal contractors without improving employment opportunities for veterans. Therefore, the comments reflect concerns with the proposal, specifically dealing with the outreach and recruitment of veterans, congruent with the ADA and data collection and benchmark requirements.

We anticipate that OFCCP will likely move forward with a final rule as soon as July 2012.

**ANPRM on Developing a Compensation Data Collection Tool**

On August 10, OFCCP issued an advanced notice of proposed rulemaking (ANPRM) soliciting public comment on development of a compensation data collection tool. The ANPRM is part of the OFCCP’s effort to address potential sex and race discrimination in pay among federal contractors. OFCCP asked federal contractors and other OFCCP stakeholders for their input on the “scope, content and format of the data collection tool, as well as suggestions for ensuring that the tool will be an effective and efficient means of identifying contractors” for OFCCP compliance reviews under Executive Order 11246.

The agency posed 15 specific questions for those submitting comments, including what compensation data should be collected, how it should be organized, whether OFCCP should consider extending any compensation data tool beyond supply and service contractors to construction industry contractors, and how to manage the potential burdens on small businesses that hire federal contractors. OFCCP emphasized that its current notice is the beginning of the rulemaking process.
and that covered contractors will have additional opportunities for comment.

CUPA-HR submitted comments, with SHRM and other employer associations, on September 28 requesting that the OFCCP withdraw the ANPRM until it and the Equal Employment Opportunity Commission has conducted research to determine whether there is an actual need for this collection of compensation data and what the least burdensome approach would be to attain any necessary information. This proposal has been suspected by many to be a strategy to circumvent congressional refusal to enact the Paycheck Fairness Act and implement some of its provisions. In the agency’s latest regulatory agenda, it slated analysis of comments for April 2012. It is unclear when it may issue a specific proposal with a NPRM but, in light of its other actions, we do anticipate it will proceed despite a wide variety of adverse comments to the ANPRM.

Other Agency Activities

Information Request on Proposed Changes to Scheduling Letter
On September 28, OFCCP formally requested the Office of Management and Budget (OMB) review and approve, in accordance with the Paperwork Reduction Act, a significant revision of the information it routinely requests on its Scheduling Letter and Itemized Listing from federal contractors. The agency proposes revising and expanding the amount of information that would be requested to initiate a compliance evaluation, known as a “desk audit.” The proposed changes would require contractors to provide new information on leave policies and collective bargaining agreements, report personnel data in five or seven separate racial and ethnic categories rather than the current two categories, and report compensation information by individual employee rather than in an aggregated format.

CUPA-HR filed comments with SHRM to the OMB on October 28 about the costs and benefits of OFCCP’s proposed changes to its scheduling letter.

Rescinding Compensation Standards and Self-Audit Guidelines
On January 3, 2011, OFCCP issued a Notice of Proposed Rescission (NPR). The agency proposed rescinding its current systemic compensation discrimination standards and self-audit guidelines for evaluating pay practices for federal contractors and subcontractors under Executive Order 11246. The compensation standards and the voluntary self-audit guidelines were both adopted in 2006 under the Bush administration.

In the NPR, OFCCP asserts that the standards have limited the agency’s ability to effectively investigate, analyze and identify compensation discrimination and that the guidelines are rarely used by federal contractors. The agency’s view is controversial, as many in the employer community welcomed the 2006 changes. The OFCCP did not specify an alternative to the current standards, other than that it intends to adhere generally to “Title VII principles” in investigations of contractors’ compensation practices. CUPA-HR filed comments on March 4, 2011. We await agency action.

Upcoming Changes to Sexual Discrimination Guidelines
While moving forward with the proposed rulemakings already mentioned, OFCCP is also working on at least one other proposed rule that it wants to finalize ahead of the November elections. A NPRM on sex discrimination guidelines was projected in the latest regulatory agenda to be released as soon as April 2012.

Trends
According to many in the contracting community, this uptick in rulemaking activity has been accompanied by persistent, and often drawn out, enforcement efforts. In the last few years, the OFCCP has hired additional compliance officers and investigators that have led to a big increase in desk audits of employers; it is now conducting 4,000 to 5,000 audits a year. Unfortunately, many employers have reported a lack of transparency, no clear methodology and unreasonably broad data requests with unreasonably short response periods as part of these enforcement proceedings. Congress is beginning to pay attention to the actions of the OFCCP for the first time in years and may do oversight hearings to shine a light on the recent flurry of activity.

Whether this level of regulatory and enforcement activity is a short-term trend or the new norm for the agency, it is important for institutions to pay attention to the rulemakings as they become finalized to ensure that they are in compliance in order to avoid future compliance issues.

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